(9)

No. 02-241

FILED

NOV 12 2002

OFFICE OF THE CLERK

In The

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF

MICHAEL E. ROSMAN
HANS BADER
CENTER FOR INDIVIDUAL RIGHTS
Suite 300
1233 20th Street N.W.
Washington, D. C. 20036
(202) 833-8400

KERRY L. MORGAN
PENTIUK, COUVREUR & KOBILJAK, P.C.
Edelson Building, Suite 200
2915 Biddle Avenue
Wyandotte, MI 48192
(734) 281-7100

DAVID F. HERR
KIRK O. KOLBO*
R. LAWRENCE PURDY
MICHAEL C. MCCARTHY
KAI H. RICHTER
MASLON EDELMAN BORMAN & BRAND, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-4140
(612) 672-8200

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

TABLE OF CONTENTS

	Page
Table of Authorities	ii
I. Introduction	1
II. Argument	1
A. Justice Powell's lone opinion in *Bakke* did not establish for the Court that "diversity" is a compelling interest	1
B. The lower courts are divided on the issues of fundamental national importance presented by this case	3
C. Review of the issues presented by this case would not be "premature."	7
D. The writ should encompass consideration of the Sixth Circuit's improper *de novo* review	9

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 3

Alexander v. Sandoval, 532 U.S. 275 (2001) 3

Anderson v. City of Bessemer, 470 U.S. 564 (1985) 10

Bose Corp. v. Consumer's Union of United States, Inc., 466 U.S. 485 (1984) 10

Hernandez v. New York, 500 U.S. 352 (1991) 10

Hopwood v. Texas, 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001) 5

Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) 4, 5

Johnson v. Board of Regents of the Univ. of Georgia, 263 F.3d 1234 (11th Cir. 2001) 4, 5

Marks v. United States, 430 U.S. 188 (1977) 4, 5

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 3

Missouri v. Jenkins, 515 U.S. 70 (1995) 8

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 10

Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978) ..... *passim*

Smith v. University of Washington Law Sch., 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) 4, 5

FEDERAL RULES

Federal Rule of Civil Procedure 52(a) 10

I. INTRODUCTION

The University of Michigan Law School respondents (the "Law School") acknowledge that the petition presents the Court with a question of fundamental national importance on which the lower courts are divided. *See* Brief in Opposition at 23, 25. Yet they oppose a writ of certiorari. When examined in any detail, it becomes apparent that the Law School's reasons for opposing certiorari are slender, intellectually incoherent, or both.

Their argument based on the asserted precedential weight of Justice Powell's lone opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), on the diversity rationale merely begs one of the questions on which the lower courts are sharply divided. The argument that it is *premature* for the Court to decide the important issues raised by the case is absurd, particularly when viewed against two of the Law School's arguments on the merits: (1) that the diversity rationale has been for *so long* used by universities as a justification for racial preferences that it would be unfair to make them change their ways now; and (2) that in those jurisdictions where courts have not recognized "diversity" as a compelling interest, disaster has followed. *See* Brief in Opposition at 20-22. Especially egregious is the plainly false argument that there is no split in the lower courts worthy of resolution by the Court.

II. ARGUMENT

A. Justice Powell's Lone Opinion in *Bakke* Did Not Establish for the Court that "Diversity" is a Compelling Interest.

A major premise in the Law School's argument for denying a writ of certiorari is a false one: that five Justices in *Bakke* agreed that "diversity" is a compelling governmental interest that can justify racial preferences in student admissions. Hence, argues the Law School, there is no reason for the Court to revisit the issue. The Law School constructs its premise through a highly

tendentious reading of the opinions of Justices Powell and Brennan. It seizes upon language contained in Part V-C of Justice Powell's opinion, which was joined by Justice Brennan and three other Justices, and upon Justice Brennan's brief reference to the "Harvard plan." Part V-C indeed contained a holding of the Court insofar as it reversed the California Supreme Court's injunction prohibiting "any" consideration of race in the admissions process. *Bakke*, 438 U.S. at 320. But the question presented by this case is much narrower and more focused than that presented by the broad state court injunction in *Bakke*. It is whether the particular justification put forth by the Law School – achieving racial diversity through the purported exercise of "academic freedom" – is one that rises to the level of a compelling interest.[1] On that question, Part V-C is conspicuous for the absence of any reference to the different rationales endorsed by Justices Powell and Brennan for justifying the consideration of race in a "properly devised" admissions system.[2] Indeed, the Law School cites to no court that has adopted *its* view that the diversity or academic-freedom rationales are endorsed in Part V-C.

The additional evidence that Justice Brennan and those Justices concurring in his opinion did not accept "diversity" as a compelling interest justifying racial classifications is that they did not join any portion of Justice Powell's opinion discussing those interests; they

[1] The district court made clear that the scope of its "injunction should not be understood as prohibiting '*any and all* use of racial preferences,' . . . but only the uses presented and argued by the defendants and intervenors." *See* App. at 300a-301a (emphasis in original).

[2] The language in Part V-C about the "competitive consideration" of race is addressed to means only. If competitiveness were a sufficient basis for considering race in admissions, it could be so in a system designed to remedy the lingering effects of societal discrimination, to provide role models to minority students, or to meet an endless list of other objectives having nothing to do with diversity.

nowhere mentioned diversity or academic freedom in their separate opinions; Justice Brennan's characterization of the "central meaning" of *Bakke* focused only on remedying past discrimination, *id.* at 325; and his reference to the "Harvard plan" was expressly tied to his remedial rationale, *id.* at 326 n.1.

The Law School is equally unpersuasive in arguing that this Court has "repeatedly acknowledged" what the Law School asserts to be the "essential holding" of *Bakke*, *i.e.*, that achieving racial diversity in the student body is a compelling interest. Brief in Opposition at 16-17. The single opinion of the Court relied upon by the Law School for its "repeated acknowledgment" argument is *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). What the *Metro Broadcasting* Court considered to be a "constitutionally permissible goal," *id.* at 568, for racial classifications, however, was something less than a compelling interest, a holding which was overruled in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Accordingly, *Metro Broadcasting's* characterization of the diversity interest as "constitutionally permissible" is not authoritative.

Strikingly, moreover, the Law School makes no effort to reconcile its certainty about the existence of a majority rationale in *Bakke* with the authorities cited in the petition evidencing that all nine Justices, in cases more recent than those cited by the Law School, have expressed at least skepticism on the subject. *See* Petition at 21 (citing and quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 218 (1995), and *Alexander v. Sandoval*, 532 U.S. 275, 308 n.15 (2001) (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.)).

B. The Lower Courts Are Divided on the Issues of Fundamental National Importance Presented by this Case.

Of course, for the purpose of evaluating the worthiness of this case for review on certiorari, the parties' arguments with respect to the respective meanings of

Bakke and Justices Powell's and Brennan's opinions are far less important than whether the lower courts have resolved these issues consistently. They have not. They certainly have not agreed on the propositions that the Law School respondents see with such pristine clarity. The decisions in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) and *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234 (11th Cir. 2001), can leave no serious doubt about whether both conflict sharply with the decisions in this case and in *Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001), on whether Justice Powell's statement of the diversity rationale is, or ever was, binding.

The Law School disparages as "substantially overstated" the "shallow conflict alleged by the petition" between the Fifth and Eleventh Circuits on the one hand, and the Sixth and Ninth, on the other. Brief in Opposition at 23. It does so because it considers the decisions in *Hopwood* and *Johnson* to be "quite murky," *id.*, which ultimately proves to mean only that the Law School disagrees with the reasoning and decisions in those cases. *Id.* The Law School, for example, chastises the court in *Hopwood* for not employing the analysis approved in *Marks v. United States*, 430 U.S. 188 (1977).[3] But the Law School's disagreement with the manner in which the Fifth Circuit reached its decision[4] hardly diminishes the

[3] The Law School tries to transform and reduce the important constitutional and civil rights questions presented in this case into a mere procedural question about how lower courts should apply the *Marks* analysis. That some courts have tried to analyze the opinions in *Bakke* through the *Marks* framework and then reached conflicting results is just one manifestation of how the lower courts are divided on the important *substantive* legal issues that the petition presents.

[4] The Law School omitted mentioning that a subsequent panel of the Fifth Circuit in *Hopwood* expressly disagreed with the Ninth Circuit's conclusion in *Smith* that a *Marks* analysis yields a conclusion that Justice Powell's diversity rationale is narrower than Justice

(Continued on following page)

existence of a conflict among the circuits. And as the petition demonstrated, among courts that have applied the *Marks* analysis, there is a distinct conflict in the conclusions reached. *See* Petition at 22-23 (comparing *Johnson* with *Smith* and *Grutter*).

The Law School notes that the Eleventh Circuit in *Johnson* did not for itself decide whether diversity is a compelling interest under strict-scrutiny analysis because it found it unnecessary to do so. But that court could not have been more unequivocal and thorough in rejecting the notion that Justice Powell's articulation of the diversity rationale in *Bakke* constituted binding precedent. *See, e.g.*, *Johnson*, 263 F.3d at 1248-51.

Speculating that the Fifth and Eleventh Circuits may someday see the error of their ways, the Law School asks that in the meantime the decisions in those cases be ignored for purposes of ascertaining whether there is a split of authority in the lower courts. *See* Brief in Opposition at 24. Of course, if the Court does not issue the writ of certiorari, it is also possible that the Sixth and Ninth Circuits may someday correct *their* errors. The Law School's argument could be made to oppose review on petition for certiorari *anytime* the petition is based on a split of authority in the lower courts.[5] Moreover, a subsequent panel of the Fifth Circuit has already addressed *Hopwood* and declined to repudiate its holding. *Hopwood v. Texas*, 236 F.3d 256, 274 (5th Cir. 2000) (Wiener, Stewart, JJ.), *cert. denied*, 533 U.S. 929 (2001); *see also id.* at 275 n.66 ("We respectfully disagree, then, with the Ninth Circuit's recent holding that Justice Powell's diversity rationale is binding Supreme Court precedent."). Indeed,

Brennan's rationale and, therefore, controlling. *See Hopwood v. Texas*, 236 F.3d 256, 275 n.66 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001).

[5] The Law School also ignores altogether the decisions in several other circuit courts expressing rejection, skepticism, doubts, or uncertainty about whether diversity is a compelling interest. *See* Petition at 23-24 (citing cases).

two of the judges on that subsequent panel had even dissented from the denial of rehearing cited by the Law School as evidence that the Fifth Circuit might eventually "correct its errors." Brief in Opposition at 24.

The Sixth Circuit's narrow-tailoring analysis does indeed also conflict with the approach taken by other courts and with principles laid down by this Court. It ignored altogether in its analysis the enormous size of the preference granted by the Law School;[6] failed to address whether the preferences had the practical effect of perpetuating a quota;[7] approved of the arbitrary inclusion and exclusion of races from the preferences; upheld preferences of unlimited duration; and required little showing of the consideration by the Law School of race-neutral alternatives. Courts in other circuits have struck down preferences for many of these reasons that the Sixth Circuit found unimportant. *See* Petition for Certiorari at 24-25 (citing cases from First, Fourth, and Eleventh Circuits).

Finally, the significance of the split in the lower courts is manifested also in the filing of an amicus curiae brief by

[6] The Law School charges petitioner with depicting the admission data in a way that misleadingly and "strategically excluded" "other Hispanic" applicants. Brief in Opposition at 7 & n.6. The accusation reflects the discomfort that the staggering size of the preference must produce even in respondents. For the entering 1995 class, the Law School created separate "grids" showing admissions outcomes by grades and LSAT scores for African-Americans, Native Americans, and Mexican-Americans. *See* JA-1492-95. It then combined this data in a grid for "selected minorities." *Id.* at JA-1501. Plaintiff's expert, using these Law School categorizations, data, and grade-LSAT combinations, merely reproduced the information for all the years at issue and also faithfully reproduced the grids for the Law School's other categories, including "other Hispanics."

[7] The Law School defends its large preferences on grounds, among other things, that no minority has a "guarantee" of admission; that many minority students are rejected for admission; and that the average odds of admission for "non-minority" students would rise only slightly in the absence of the preferences. *See* Brief in Opposition at 8. Of course, all the same things could be said about the illegal Davis admissions system struck down in *Bakke*. *See Bakke*, 438 U.S. at 273-76.

Attorneys General from nine states and one United States Territory, dispersed across six of the circuits, asking the Court to grant the petition.

C. Review of the Issues Presented by this Case Would Not Be "Premature."

The Law School's argument that the issues presented by the case are just too important for resolution now, without more litigation in the lower courts, is almost comic. It rests first on the false premise that the lower courts have given "virtually no consideration," Brief in Opposition at 25, to the question whether diversity is a compelling interest. *See* Petition at 23-24 (citing and quoting cases in which courts have criticized diversity as a rationale used to justify racial preferences). It is also based on a misplaced reliance on social science evidence to ascertain the scope of constitutional rights and a bold misrepresentation that evidence of the benefits of diversity is "overwhelmingly and essentially uncontested within the education community." Brief in Opposition at 26.

Justice Powell, in concluding for himself in *Bakke* that diversity was a compelling interest, did not rest his conclusion on a survey of social science studies. The resolution of the issue now does not depend on such evidence and should not be deferred to some unknown date in the future. The issue is one of law, and the Law School itself treated it as such in the courts below. Accordingly, it is appropriate to decide the issue now and resolve the disagreement in the lower courts, rather than to await still "further development" in those courts. *Id.* at 25.

In arguing that the record in this case could not support the result that petitioner seeks, *see id.* at 26, the Law School reveals how misconceived is the foundation for its racial preferences. First, the burden is on the *Law School* to prove that its preferences are justified by a compelling interest; it is not petitioner's burden to prove the opposite. Second, contrary to the Law School's characterization, petitioner's arguments why diversity cannot constitute a compelling interest are based on the

nature of the interest itself, not merely on a premise that only an interest in remedying past discrimination can qualify as compelling. Third, as already noted, the answer to the important questions presented do not depend on which side produces the most social science. Whether there are any educational benefits that flow from racial diversity in the classroom is a quite different question from whether such benefits rise to the level of a compelling governmental interest sufficient to justify racial preferences in admissions. It can be assumed, for example, that educational benefits would flow from remedying the lingering effects of societal discrimination or providing minority students with role-model teachers. But those interests, for reasons that the Court's precedents explain, are not compelling interests justifying racial classifications. The issue this case presents is whether the same kinds of reasons, as well as others, preclude diversity from being a compelling interest.[8]

Finally, the Law School makes an inflammatory and irresponsible argument that "resegregation" would result from a decision by the Court that racial preferences cannot be justified by an asserted interest in racial diversity. *See* Brief in Opposition at 21. First, it is appalling to equate legal barriers based on race with the results of policies applied in a race-neutral manner. *See Missouri v. Jenkins*,

[8] For these reasons, in arguing that she was entitled to summary judgment, petitioner assumed that there are some educational benefits flowing from diversity. The evidence for the superlative claims that the Law School makes for its evidence on the benefits of diversity is, however, far from "overwhelming" or "essentially uncontested." Brief in Opposition at 26. Published literature and materials in the district court record demonstrate that strong exceptions have been taken to the Law School's claims and the specific evidence it produced for this litigation on the issue. *See, e.g.*, Amicus Curiae Brief of the National Association of Scholars (JA-2766); Reports of plaintiff's experts, Professors Gail Heriot, Charles Geshekter, Finis Welch (JA-2911, 2929, 3388). Moreover, whether there are in fact such benefits does not address whether they are outweighed by the harm that racial preferences entail.

515 U.S. 70, 122 (1995) (Thomas, J., concurring) ("Racial isolation itself is not a harm; only state-enforced segregation is."). Second, the Law School is demonstrably wrong about the facts. Colleges and universities in three of the Nation's largest states (California, Texas, and Florida), as well as several others, already operate under a rule of law that forbids the use of race in admissions to achieve racial diversity. Publicly available data from institutions in these states as well as evidence produced in this case belie the Law School's incendiary prediction. Not only have selective institutions in these states not "resegregated," they are among the most racially diverse campuses in the country. In fact, in recent years the percentage of admitted students from what the Law School calls the three "underrepresented" minority groups has, at places like UCLA Law School, Boalt Hall School of Law, and the University of Texas Law School, met or exceeded the minimum 10 percent that the district court found defines the University of Michigan Law School's "critical mass," or quota.

D. The Writ Should Encompass Consideration of the Sixth Circuit's Improper *De Novo* Review.

The Law School characterizes the district findings which the Sixth Circuit reversed following *de novo* review as "legal conclusions or characterizations." Brief in Opposition at 30. This is plainly wrong. The district court's findings with which the Sixth Circuit disagreed included such basic and important factual matters as the Law School's failure to consider race-neutral alternatives, *see* App. at 251a; and the inclusion of some racial minorities in the preferences, but not others, *e.g.*, a preference given Puerto Ricans raised on the U.S. mainland, but not those raised in Puerto Rico, *see* App. at 249a-250a; and a preference given to Mexican-Americans, but not to "other Hispanics," *see id.* These are obviously *facts*, and not even arguably "mixed" questions of fact and law. They are also highly important to the resolution of the legal issues involved in strict scrutiny of racial classifications, as the Law School's repeated assertions of *contrary* facts *rejected* by the district court demonstrate. *See, e.g.*, Brief in

Opposition at 6 n.5, 10. Indeed, one cannot fully address the first "Question Presented" without reference to these significant facts.

It is extraordinary that the Sixth Circuit substituted its fact-finding determinations for those of a district court that made its own following trial. *See* Federal Rule of Civil Procedure 52(a) ("[f]indings of fact shall not be set aside unless clearly erroneous"). There is no exception to the "clearly erroneous" standard of review for discrimination cases. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 364-67 (1991) (rejecting argument that standard of review approved in cases such as *Bose Corp. v. Consumer's Union of United States, Inc.*, 466 U.S. 485 (1984), had application in review of plaintiffs' equal protection claims); *Anderson v. City of Bessemer*, 470 U.S. 564, 574-75 (1985) (discrimination case) (rejecting notion that "an appellate court may exercise *de novo* review over findings not based on credibility determinations"); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) (question whether one intended to discriminate was one of pure fact). In accepting review of this case, the petitioner respectfully submits that the Court should address the Sixth Circuit's failure to apply a clearly erroneous standard of review.

Respectfully submitted,

MICHAEL E. ROSMAN
HANS BADER
CENTER FOR INDIVIDUAL RIGHTS
Suite 300
1233 20th Street N.W.
Washington, D. C. 20036
(202) 833-8400

KERRY L. MORGAN
PENTIUK, COUVREUR
& KOBILJAK, P.C.
Edelson Building, Suite 200
2915 Biddle Avenue
Wyandotte, MI 48192
(734) 281-7100

DAVID F. HERR
KIRK O. KOLBO*
R. LAWRENCE PURDY
MICHAEL C. MCCARTHY
KAI H. RICHTER

MASLON EDELMAN BORMAN
& BRAND, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota
55402-4140
(612) 672-8200

Counsel of Record